United States Court of Appeals

for the Second Circuit



APPELLANT'S REPLY BRIEF

76-6137
76-6168

To be argued by
MARVIN SCHWARTZ

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 76-6137, 76-6168

W. J. USERY, Secretary of Labor, United States Department of Labor,

Plaintiff-Appellee,

—against—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FILED
DEC 10 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
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W.J. USERY, Secretary of Labor
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

-against-

76-6137

INTERNATIONAL ORGANIZATION OF MASTERS,
MATES AND PILOTS, INTERNATIONAL
MARITIME DIVISION, ILA, AFL-CIO,

Defendant-Appellant.

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DEFENDANT-APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

In this Reply Brief we will respond to the contentions advanced by the Secretary of Labor in Points A, B and C of his Brief. There is no disagreement of the parties with respect to the relevant facts in this case. Despite the legal arguments made by the Secretary, it is apparent that this case is one of first impression. The Secretary of Labor is exploring the periphery of the LMRDA.

REPLYING TO APPELLEE'S POINT A

In this portion of his Brief, the Secretary argues that he has broad authority to supervise all aspects of remedial elections, including the power and duty not to adhere to union constitutional or by-law provisions which violate 29 U.S.C. §481. The Union does not dispute the Secretary's right to have a judicial determination as to the validity of the provisions which the Secretary, in his supervisory capacity, alleges to be unlawful. Rather, the Union maintains that the District Court erred in finding that the "double duty provision" violates §481.

Although the Union does not disagree with the arguments made in this portion of the Appellee's Brief, it is nonetheless important to examine some of the cases which the Secretary cites. These cases do indicate that a union cannot conduct its court-ordered remedial election under constitutional or by-law provisions which violate Title IV of the Act. However, each of these cases involved union conduct or provisions which allegedly violated an express statutory mandate, or the union's own constitution and by-laws. These cases only further demonstrate that the Secretary, in the instant case, is reaching beyond the well-established standards and procedural guidelines of Title IV of the Act.

For example, the Secretary states that in Brennan v.

Teamsters, Local 639, 494 F. 2d 1092 (D.C. Cir. 1974), the Union was directed in its supervised election "not to use an invalid by-law provision, notwithstanding the fact that that violation might not even have constituted a ground to set aside the election in the first instance." (Appellee's Brief, p. 14) The Local's invalid by-law provision in this case, however, was an eligibility requirement which, as originally applied, clearly violated the International Constitution; indeed, the International President had twice ruled explicitly that the Local's meeting attendance requirement was inconsistent with the Constitution and had even directed the Local not to apply its provision. 494 F. 2d at 1098-99. Thus the Secretary was simply conducting the election "in conformity with the Constitution and by-laws of the labor organization," as required by 29 U.S.C. §482(c).* In addition, this meeting attendance requirement "effectively disqualified 97 percent of the members from running for office."

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*The only reason the eligibility requirement "might not even have constituted a ground to set aside the election in the first instance" was because the exhaustion requirement of the Act had not been satisfied. 494 F. 2d at 1099.

494 F. 2d at 1099.* The "reasonableness" of meeting attendance requirements is traditionally and indisputably subject to challenge under the express language of 29 U.S.C. §481(e), "...every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed)."

In Hodgson v. Steelworkers, Local 1299, 453 F. 2d 565 (6th Cir. 1971), the Secretary of Labor asserted the right to supervise "both the nominating and balloting aspects of the new election;" here again, the language of the Act expressly applies, requiring that "a reasonable opportunity shall be given for the nomination of candidates," 29 U.S.C. 481(e). In Hodgson v. Steelworkers, Local 6799, 403 U.S. 333 (1971), the Secretary challenged the reasonableness of a meeting attendance requirement for candidate eligibility under 481(e), (although a decision on the merits was barred because the statute's exhaustion requirement had not been met). Brennan v. Sindicato Empleados de Equipa Pescado, 370 F. Supp. 872 (D.P.R. 1974), involved

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*At least two prior court decisions had declared "unreasonable" eligibility requirements which disqualified 93 and 94.7 respectively, of the unions' membership from holding office, Wirtz v. Hotel, Motel & Club Employees, Local 6, 391 U.S. 492 (1968), and Brennan v. Steelworkers, Local 3911, 372 F. Supp. 961 (N.D. Ill. 1973); see also Wirtz v. Glass Bottle Blowers, Local 153, 244 F. Supp. 745 (W.D. Pa. 1965).

blatant and "defenseless" use of union monies and facilities to promote the candidacy of the incumbent president in a supervised election, a clear violation of 481(g).

All of these cases involved claimed illegalities which could be linked to specific election provisions of Title IV of the Act. Judicial intervention clearly served to protect members' rights and to vindicate the intent of Congress as expressed in Title IV. These cases stand in eloquent contrast to the strained application of Title IV advanced by the Secretary of Labor in the instant case.

REPLYING TO APPELLEE'S POINT B

PART I

The Secretary begins his main argument by stating, "Title IV of the Act...sets the minimal* standards concerning the conduct of elections to which unions must conform." (Appellee's Brief, p. 15); the Secretary then partially quotes from Wirtz v. Glass Bottle Blowers, Local 153, as follows:

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*It is unclear from the Secretary's Brief what is meant by his recurring use of the term, "minimal", which was used by the Supreme Court in Wirtz v. Glass Bottle Blowers, Local 153, in the following context: "...Congress, although committed to minimal intervention was obviously equally committed to making that intervention, once warranted, effective in carrying out (cont.)

> "...the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into §401." 389 U.S. at 471.

In the balance of the quotation, which the Secretary omits, the Supreme Court specifies just what those "democratic principles written into §401" really are:

> "But the freedom allowed unions to run their own elections was reserved for those elections which conform to the democratic principles written into §401. International union elections must not be held not less often than once every five years and local union elections not less often than once every three years. Elections must be by secret ballot among the members in good standing except that international unions may elect their officers at a convention of delegates chosen by secret ballot. 29 U.S.C. §§481(a), (b). Specific provisions insure equality of treatment in the mailing of campaign literature; require adequate safeguards to insure a fair

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*(cont.) the basic aim of Title IV." 389 U.S. 463, 473 (1968). On the one hand, the Secretary could be arguing that in alleging the illegality of the "double duty provision," he is merely staying within the guidelines of Title IV, which everyone agrees are "minimal." On the other hand, the Secretary could be taking the novel position that Congress, in Title IV, did not mean to be exhaustive but was merely setting out the "minimal" skeleton framework for government regulation of union elections; and that the Department of Labor will henceforth take on a role analogous to that of the Supreme Court in the field of Labor arbitration, to "legislate" in the gaps left by Congress. As will be noted in our Reply Brief, infra, it appears that the Secretary is consciously or unconsciously arguing for the latter proposition.

> election, including the right of any candidate to have observers at the polls and at the counting of ballots; guarantee a 'reasonable opportunity' for the nomination of candidates, the right to vote without fear of reprisal, and pertinent to the case before us, the right of every member in good standing to be a candidate subject to 'reasonable qualifications uniformly imposed.' 29 U.S.C. §§481(c)(e)."

The Supreme Court here expounds no sweeping, implied "democratic principles" to which unions' constitutions must conform; rather, the Court merely lists the election guidelines set forth expressly in the Act, and nothing more.

The plain language of the Act needs no forced or arbitrary emphasis in order to make its intent apparent; that intent is a limited one, as is explained in Wirtz v. Glass Bottle Blowers. The federal courts have avoided distorting the content of Title IV in their interpretation and application of its election safeguards, see Wirtz v. Hotel, Motel and Club Employees, Local 6, 391 U.S. 492 (1968). Despite the Secretary's declarations as to the "clear" meaning of §481(a), (b) and (d), no legal precedent whatsoever exists for the extension of these provisions to an arrangement such as the IOMM&P's "double duty provision." The Secretary's arguments do not alter the fact that this case is one of first impression in which the Secretary is exploring the periphery of the statute. The Secretary, of course, is entitled to explore the periphery but the Court

must recognize that when he does so he acts as an advocate, not an expert, and his opinions are to be accorded no special deference as to administrative expertise. It is the court alone which has the responsibility of interpreting and applying the provisions of the LMRDA. As Judge Learned Hand stated for the Second Circuit in Fishgold v. Sullivan Drydock & Repair Corp., 154 F. 2d 785 (2d Cir. 1946):

> "...the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. ...Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative; ...Be that as it may, concededly all such considerations are only cautionary, and not authoritative, for in the end, after whatever reserve, upon the Courts rest the ultimate responsibility of declaring what a statute means."
> 154 F. 2d at 789, 790.

PART II

The Secretary next argues that the Union's "double duty provision" violates "democratic principles" of "responsiveness," likening the instant case to the situation in which"elections of union officers are not in fact held" (Appellee's Brief, p. 17). Further on, the Secretary declares, "the arrangement is

fraught with the potential for electing those who are not 'responsive' to or representative of the Offshore Division membership."*

The Secretary, however, ignores the fact that the Union's "double duty provison" is not at all similar to the holding of no elections at all. The Union's membership at large voted in a secret ninety day mail ballot referendum to amend the IOMM&P Constitution to include the "double duty provision;" and then, in a separate action, the Offshore Locals' membership adopted, by a secret ninety day mail ballot referendum, a set of Offshore Division By-Laws which implemented the "double duty provision." Thus the "double duty provision" only came about in response to the desires of the Offshore Division membership, expressed in a democratic manner with the

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*As a footnote to its statement that "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic elections'", the Supreme Court in Wirtz v. Glass Bottle Blowers set out the following Congressional language with respect to "responsiveness": (footnote #9, 389 U.S. 463, 470 (1968)

> "9...The Government which gives Unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guarantee of free and periodic elections. The responsiveness of union officers to the will of the members depends upon the frequency of elections and an honest count of the ballots." [Emphasis ours] S. Rep. No. 187, 86th Cong., 1st Sess., 20.

requisite democratic procedural safeguards. The provision continues to exist by virtue of the will of the membership.*

PART III

As a related argument, the Secretary relies on "democratic principles as known in the United States," and raises again the "President of the United States-Governor of New York" issue. These arguments have been refuted in the Appellant's Brief, pp. 17-19 and the Secretary's continued reliance on them reveals the absence of any legal precedent for his position. As noted above, the courts have not gone beyond the express mandates of §481 to read into the Act any unstated, vague "democratic principles." But even if the Secretary were able to point to some applicable "principle," which is doubtful, the "President-Governor" analogy is certainly not such a principle. For, as stated in the Appellant's Brief, if the people of the State of New York and the people of

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* The union recently completed a Court-ordered rerun referendum on the 1970 Constitution, which first adopted the "double duty provision." As in 1970, the vote was by secret ninety day mail ballot referendum. In this referendum, the membership once again approved the Constitution and the "double duty provision." This time the approval was by an overwhelming majority. The exact vote breakdown in the latest referendum is as follows:

Total number of envelopes counted: 3477**

Yes:	2477
No:	994
blank:	2
void:	0

**4 envelopes contained ballots from a different referendum and were not counted

the United States were to amend their constitutions by democratic means to include a "double duty provision" as did the IOMM&P and its Offshore Division, then such a provision would itself be a "democratic principle." In any event, however, the democratic safeguards promulgated by Congress for labor unions are primarily procedural ones. There is nothing inherently undemocratic or procedurally defective about the Union's "double duty provision."

PART IV

The Secretary, searching for some textual basis in the statute for his allegations of unlawfulness, returns again and again to §481(a), (b) and (d). However, the Secretary re-emphasizes his inability to specify which if any of these provisions applies in this case:

> "The Court need not decide whether the Offshore Division is a national, intermediate or local organization or determine, in particular whether Section 481(a), (b) or (d) has been violated; for no matter what the Offshore Division is called, the plain fact is that the Offshore Division holds its elections simultaneously with the International elections every three years (see pp. 8-9, surpa) and under its By-laws and the IOMM&P Constitution no proper election at all has been or can be held. That is all that need be shown to establish that the invalid arrangement violates Section 481(a), (b) and/or (d)."

It is a nice feat of legerdemain to construct a statutory violation out of the combination of three statutory provisions when one cannot show which of them applies, but such an analysis does not fit the purposes of the Act.

The Secretary's analytical dilemma is not simply a minor issue to be disposed of casually in a footnote. Rather, it lies at the heart of the Secretary's whole argument, and shows it to be fundamentally defective. The Union maintains that it should not be necessary to tortue and strain clear statutory language and intent in this matter in order to apply the law to invalidate the "double duty provision." The fact that the Secretary must go to such lengths in order to create a violation of the statute is a compelling argument that these provisions were never designed to emcompass the issue raised in the instant case.

Whether or not the Secretary says it or means it here the Secretary is in effect arguing for a totally new, expanded role for the Department of Labor which goes beyond the mandates of Title IV as heretofore interpreted by the Courts of the United States. Title IV, the Secretary seems to say, is no longer to be read as the limited product of Congress' weighing "how best to legislate against revealed absuses in union elections without departing needlessly from its longstanding policy against unnecessary intrusion into internal union affairs." Wirtz v. Glass Bottle Blowers, Local 153, 389 U.S. 463, 470-

471. Instead, according to this view, Congress simply provided a legal mechanism for setting aside union elections which violate implied democratic norms, leaving it to the Secretary of Labor to determine what these standards are. In deciding what is legal and illegal, the Secretary is not limited to the substantive provisions of Title IV; nor is he limited to challenging defects in the union's election process, despite all the legislative history indicating that Congress deliberately chose to promote union"democracy" and "responsiveness" only by means of insuring frequent and fair elections. (See Appellant's Brief, pp. 13-17; Reply Brief, supra, pp. 4-7, footnote p. 9) The Union submits that there is no legal basis for such an expansion of Title IV.

The burden, in suits under §482, is upon the Secretary to prove that a statutory violation has occurred. In the instant case, the Secretary's position lacks foundation in plain statutory language, case law, legislative history, or sound principles of statutory construction. The Secretary fails to meet his burden.

REPLYING TO APPELLEE'S POINT C

PART I

In this portion of the Appellee's Brief, the Secretary attempts to unsuccessfully rebut the Appellant's arguments. First, the Secretary suggests that Judge Motley did not really

base her ruling squarely on Wirtz v. National Maritime Union, 399, F. 2d 544 (2d Cir. 1968), affirming 284 F. Supp. 47 (S.D. N.Y. 1968). The Secretary is obviously uncomfortable with Judge Motley's analysis of the NMU case and has tried to improve on it. If in fact all that was intended by Judge Motley was an analogy between two elections neither of which met the requirements of the statute, then it is unclear how the NMU case is particularly relevant. In any event, however, subsequent judical interpretations of the NMU case do not support the Secretary's claim that the NMU's failure to hold any election for certain statutory "officers," is in any way "similar" to the instant situation in which duly elected officers perform "double duty."

PART II

The Secretary's treatment of legislative history and of the Hotel, Motel and Club Employees case does not blunt the Union's argument that the only "democratic principles written into §401" [emphasis added] are those "minimal" procedural election safeguards and guidelines which are required by the statute. It is true that Congress provided the "framework" for union democracy by insuring frequent and fair union elections, and not by legislative judgments as to the propriety of union organizational features. To conclude that Congress struck the "balance," between unnecessary intervention and the

strong public interest in the conduct of union elections, far short of invalidating the Union's "double duty provision," is not to circumvent the provisions of Title IV.

PART III

The Secretary further misreads the Union's contentions set forth in pp. 19-22 of the Appellant's Brief. The Union there argued not that the Secretary opposed the Offshore Division's structure of the function of its officers, but rather that the Secretary does not approve of the Union's not-quite-fully integrated national structure insofar as it embodies divisional entities such as the Offshore Division. If the IOMM&P were to abolish altogether any semblance of autonomy for divisional members, there would be no claims of violation of the Act. This illustration was intended to explain that the Secretary's argument based on principles of "democracy" or "responsiveness" is insubstantial. The Secretary's position that it would be proper to further "concentrate power" in the Union so long as the IOMM&P "charter" was appropriately modified, does not in any way promote "democracy" or "responsiveness" within the Union; in fact, it would negate the existing degree of responsiveness and representation within a centralized structure, which the union membership so carefully worked out.

PART IV

Finally, the Secretary fails to demonstrate how Fritsch

v. Painters, District Council 9, 359 F. Supp. 380 (S.D.N.Y. 1973) supports his position. In Fritsch, the court rejected the claim mistakenly said by the Secretary to be analogous to the instant case, and noted its inability to fashion a remedy which would disqualify some affiliated locals from voting for their District Council's Secretary-Treasurer. In discussing possible solutions to the Council's organizational problems, the Court emphasized, "there is grave question whether we should compel a labor organization so to double its number of permanent full-time elected officials, with resultant increase in its administrative overhead." 359 F. Supp. at 395.

The Union submits that the invalidation of the "double duty provision" as the Secretary of Labor demands, would have precisely the questionable result criticized by Judge Brieant in Fritsch, supra. This is but an additional reason why the decision below must be reversed.

CONCLUSION

For all the foregoing reasons and for those set forth in our principal brief, we respectfully urge that the Judgment and Order below be vacated.

DATED: December 9, 1976
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Respectfully submitted,

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